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No. 89-1800

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

ASSAY PARTNERS,

Petitioner,

-against-

CITY OF NEW YORK, DEPARTMENT OF FINANCE OF THE CITY OF NEW YORK, and ABRAHAM BIDERMAN, as Commissioner,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

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June 15, 1990.
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COUNTER-QUESTIONS PRESENTED

1. Whether the New York City Real Property Transfer Tax (NYRPTT) unconstitutionally discriminates against the United States and those dealing with it by granting an exemption to grantees of the United Nations ("or other world-wide international organizations of which the United States is a member") while no exemption is provided for grantees of the United States or any other federal, state or local governmental entity.

2. Whether the NYRPTT unconstitutionally discriminates against the United States and those dealing with it by granting an exemption to grantees of religious, charitable and educational organizations while no exemption is provided for grantees of the United States or any other federal, state or local governmental entity.

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PRELIMINARY STATEMENT

Petitioner seeks review of a decision of the Appellate Division of the Supreme Court of the State of New York, First Department, which held, inter alia, that provisions of the New York City Real Property Transfer Tax

Statute which exempt from tax grantees of religious, charitable and educational organizations and the United Nations but do not exempt grantees of the United States or any other federal, state or local government entity do not discriminate against the United States or those who deal with the United States and, therefore, do not violate the Supremacy Clause. The Appellate Division decision is reported as Assay Partners v. City of New York, 149 AD2d 63 (1st Dept. 1989). (5a et seq.).[1] The judgment of the Appellate Division was entered August 10, 1989. On November 30, 1989, the Court of Appeals dismissed petitioner's appeal, taken as of right pursuant to Civil Practice Law Rules §5601(b)(1), for failure to present a

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[1] Unless otherwise indicated, page references in parentheses are to the petition.

substantial constitutional question. 74 NY2d 944 (1989). (16a-17a). On February 14, 1990, the Court of Appeals denied petitioner's motion for leave to appeal pursuant to Civil Practice Law and Rules §5602(a)(1)(i). 75 NY2d 705 (1990). (14a-15a).

STATUTES

New York City Administrative Code §11-2106, the portion of the RPTT Statute dealing with exemptions from tax, provides in pertinent part:

> **Sec. 11-2106. Exemptions.** --a. The following shall be exempt from the payment of the tax imposed by this chapter and from filing a return:
>
> 1. The state of New York, or any of its agencies instrumentalities, public corporations (including a public corporation created pursuant to agreement or compact with another state or the Dominion of Canada) or political subdivisions;
>
> 2. The United States of America, and any of its agencies and instrumentalities, insofar as they are immune from taxation, provided, however, that the exemption of such governmental bodies or persons shall not relieve a grantee from them of liability for the tax or from filing a return.
>
> b. The tax imposed by this chapter shall not apply to any of the following deeds, instruments or transactions:
>
> 1. A deed, instrument or transaction conveying or

transferring real property or an economic interest therein by or to the United Nations or other world-wide international organizations of which the United States of America is a member;

2. A deed, instrument or transaction conveying or transferring real property or an economic interest therein by or to any corporation, or association, or trust, or community chest, fund or foundation, organized and operated exclusively for religious, charitable, or educational purposes, or for the prevention of cruelty to children or animals, and no part of the net earnings of which inures to the benefit of any private shareholder or individual and substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation; provided, however, that nothing in this paragraph shall include any organization operated for the primary purpose of carrying on a trade or business for profit, whether or not all of its profits are payable to one or more organizations described in this paragraph.

ARGUMENT

THE TAX EXEMPTION PROVIDED FOR GRANTEES OF RELIGIOUS, CHARITABLE AND EDUCATIONAL ORGANIZATIONS AND OF THE UNITED NATIONS, BUT NOT PROVIDED FOR GRANTEES OF THE UNITED STATES OR ANY OTHER FEDERAL, STATE, OR LOCAL GOVERNMENTAL ENTITY, DOES NOT DISCRIMINATE AGAINST THE UNITED STATES BECAUSE THE EXEMPTION IS "JUSTIFIED BY SIGNIFICANT DIFFERENCES" BETWEEN THE EXEMPT AND NON-EXEMPT ENTITIES, AND THUS COMPLIES WITH THE STANDARD ESTABLISHED BY THIS COURT'S PRIOR DECISIONS. MOREOVER, THIS COURT HAS HELD THAT TAX BENEFITS ACCORDED TO PERSONS DEALING WITH RELIGIOUS, CHARITABLE AND EDUCATIONAL ORGANIZATIONS DO NOT, PER SE, VIOLATE THE SUPREMACY CLAUSE.

Petitioner alleges that the New York City Real Property Transfer Tax ("RPTT") violates the Supremacy Clause on the ground that grantees of religious, charitable and educational institutions and grantees of the

United Nations[2] are exempted from tax, while grantees of governmental entities, including the United States, receive no such exemption. In the decision below, the Appellate Division of the New York Supreme Court held that petitioner's challenge to the exemption for religious, charitable and educational organizations, is disposed of by this Court's per curiam affirmance in United States v. Illinois Department of Revenue, 371 US 21 (1962), aff'g 202 F. Supp 757 (N.D. Ill. 1962), which sustained an identical classification against a Supremacy Clause challenge. 149 AD2d 63, 66-67. As to the UN exemption, the Appellate Division held

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[2] The clause exempting grantees of the United Nations also exempts grantees of "other world-wide international organizations of which the United States is a member". Administrative Code §11-2106(b)(1). However, there is no evidence in the record that this exemption has been applied to any entity other than the United Nations.

that it was "reasonable" for the City to accord the UN and similar international organizations the same tax treatment as religious, educational and charitable organizations. Id., 67. Respondents submit that the decision of the Appellate Division was correct in all respects, as was the decision of this Court in Illinois Revenue, supra. The classification of exempt and non-exempt entities established by the RPTT clearly meets the applicable constitutional test, set forth in Phillips Chemical Co. v. Dumas Independent School District, 361 US 376, 383 (1960), in that it is amply "justified by significant differences between the two classes". See also, Davis v. Michigan Dept. of Treasury, __US__,109 S. Ct. 1500, 1508 (1989) (applying test of Phillips Chemical). There is no claim that, in enacting the challenged exemptions, the City sought "to benefit itself or those in privity with it."

Davis v. Michigan Dept. of Treasury, supra, at 1507.

1. The New York City RPTT

The Real Property Transfer Tax ("RPTT") is imposed on each deed or other written instrument which effects a transfer of real property located in the City. Administrative Code §§2101, 2102. The amount of tax, as applicable to this case, is two percent of the purchase price. Ordinarily, both the grantor and grantee are liable for the tax. However, where the grantor is a unit of the federal, state or local government, only the grantee is liable. Administrative Code §2106. The statute further provides that transfers to or from religious, charitable or educational organizations and transfers to or from the United Nations ("or other world wide international organizations of which the

United States is a member") are entirely exempt. There are no other relevant exemptions.

2. Exemption for Religious, Charitable and Educational Organizations

In United States v. Illinois Department of Revenue, supra, this Court directly held that the Supremacy Clause does not mandate equality of tax treatment between persons dealing with the federal government, and persons dealing with religious, charitable and educational organizations. In Illinois Revenue, the federal government, and other plaintiffs, challenged an Illinois "occupation tax" upon proceeds of retail sales within the state. The applicable statute exempted proceeds of sales to "charitable, religious or educational" organizations but provided no exemptions for sales to the federal government or its instrumentalities, or to any other state or local governmental unit.

202 F. Supp., at 758. The plaintiffs alleged that this exemption resulted in impermissible discrimination against those dealing with the United States, the identical claim raised in the instant petition. (The Illinois Revenue plaintiffs also explicitly raised the same "discrimination" issue in their appeal to this Court. United States v. Illinois Department of Revenue, Jurisdictional Statement, 2.)

The district court decision in Illinois Revenue, expressly relying on Phillips Chemical v. Dumas Independent School District, supra, held that significant differences between religious, charitable or educational organizations, on the one hand, and governmental units, on the other, provided "a reasonable basis for separate classification." (Id., 759). There was no "discrimination" against the United States so long as federal and state governmental units were accorded equal tax treatment. Illinois

Revenue provided a detailed discussion of the public policy justification for the favored tax treatment of private, non-profit organizations (Id.):

> The exemption of these institutions encourages their existence and relieves the State of the heavy burden of maintaining and performing these essential services. Article VIII, Sec. 3 of the Constitution of the State of Illinois forbids the use of public funds in the "aid of any church or sectarian purposes" nor may "any grant or donation of land, money or other personal property ever be made by the state or any such public corporation, to any church, or for any sectarian purpose." Obviously, a distinct dissimilarity exists between religious institutions and governmental bodies. While charitable and educational objectives can, and are, performed through governmental units, the revenue to support them is derived from the power and authority of the government to tax its citizens for the public welfare. But no compulsory process exists to exact contributions to non-governmental organizations dedicated to the moral, spiritual and physical well-being of mankind. The financial resources to accomplish their objectives are derived from the concept of giving voluntarily -

> without legal obligation or compulsion. This difference forms a reasonable basis for a separate classification and the exemption, therefore, does not discriminate against governmental bodies.

In light of these considerations, the three-judge district court sustained the constitutional validity of the Illinois tax. This Court affirmed that decision.

3. The UN Exemption

The UN exemption should be sustained on the same grounds as are applicable to the exemption for grantees of religious, charitable and educational organizations. In this regard, the Appellate Division stated (149 AD2d 67):

> Petitioner's claim that the added exemptions in this case to grantees of the United Nations and other international organizations, and not to grantees of the United States, discriminates against the United States, is also without merit. International organizations are composed of numbers of sovereign states, including the United States, bound together for

> various purposes. It would appear reasonable for the City to place such organizations in the same category as religious, charitable and educational institutions, since they have been formed to carry out many of the functions of the latter institutions. It should be appreciated, in addition, that the City of New York, in extending such an exemption to the grantees of the United Nations and other international organizations, supports and furthers the public policy of the United States as the host country, by welcoming and supporting such international endeavors.

Thus, the RPTT exemptions to grantees of religious, charitable and educational organizations and the UN assist organizations which are engaged in vital public service but which cannot support their activities through business profits or tax revenue. No interest of the United States (which is not participating in this litigation in any capacity) is adversely affected. Finally, the Appellate Division decision is not in conflict with any decision of a federal court.

For all the above reasons, the petition for a writ of certiorari should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

June 15, 1990.

Respectfully submitted

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